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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL NGUYEN,

Defendant and Appellant.

C058694

(Super. Ct. No.
07F04118)

Defendant Michael Nguyen appeals following his conviction on six counts of being a felon in possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) He claims the trial court erred by (1) refusing to allow him to examine a prosecution witness's binder during cross-examination in violation of Evidence Code section 771, and (2) not staying the sentences on five of the six counts under Penal Code section 654. We conclude the court committed no error and affirm the judgment.

FACTS

Defendant was a parolee living in Sacramento County. His parole officer became concerned that defendant was no longer living at his residence of record. He met with defendant on April 25, 2007, and asked him where he lived. Defendant initially claimed he had not changed his residence, but later stated he had changed his residence and gave the officer a new address. He said he stayed the previous night at that address with friends. He also told the officer he occasionally stayed with his girlfriend, Sang Le, and her brother, Dat Le, at their apartment but he did not know their address. As defendant left the parole office, Sacramento police officers contacted him and obtained some keys from him.

That same day, law enforcement officers visited an apartment belonging to defendant's girlfriend, Sang Le, and her brother, Dat Le, and their family. A detective showed Dat Le some of the keys which had been obtained from defendant. Dat Le identified the keys as looking like the keys to his family's apartment. The detective confirmed that the keys fit the apartment's front door.

Family members told the officers that defendant was Sang Le's boyfriend, and he stayed at the apartment several nights a week. He had stayed there the previous night. Defendant gave

money to Sang Le to help the family pay for utilities. He brought only one or two sets of clothing over at a time.¹

A detective went to search the room which defendant occupied, but it was locked. The detective kicked the door open, and officers entered the room. Inside the room's closet, officers found a cardboard box containing six firearms: a loaded .45-caliber handgun with an extra magazine, a loaded nine-millimeter semiautomatic handgun, a .357 revolver, a .38 revolver, and two loaded .40-caliber semiautomatic handguns with magazines.

Officers found two other items in the room identified with defendant. They located a Blockbuster card with defendant's name inside a pink purse on the floor. They also found an envelope with defendant's name and return address in the upper left corner. Boxes of ammunition were found in another room's closet.

DISCUSSION

I

Evidence Code Section 771

Defendant claims the trial court violated Evidence Code section 771 and his federal constitutional rights to due process and to present a complete defense when it denied defense counsel's request to examine a binder used by a prosecution

¹ At trial, Dat Le and Sang Le recanted their statements to police, testifying that defendant had never stayed overnight at their apartment and that he did not have a key to their apartment.

witness during his cross-examination. We conclude the court did not err in this instance.

A. *Additional background information*

Detective Jeffrey Beezley of the Sacramento Police Department was the lead investigator on defendant's case. He testified at trial for the prosecution.

Detective Beezley had a binder with him at trial, and he opened the binder immediately upon beginning his testimony on direct. After the detective responded to the first question put to him, "[Who] do you work for?", defense counsel asked the court if he could see the detective's binder and what he was referring to. The court denied the request, telling counsel he had "all those copies" and could check it at the break. The court was not going to allow defense counsel to view every written report relied upon during trial to see if he had a copy of the same report.

Shortly after defense counsel started to cross-examine Detective Beezley, he asked the detective if all of the police reports were generated with the detective's name on top. The detective replied, "No." Counsel then asked the court if he could approach the witness. It was 4:30 p.m., so the court decided to break for the day at that time. It told counsel, "You can have your reports and be prepared for cross-examination."

After the jurors were dismissed, the court and the attorneys had a discussion off record. When they came back on the record, defense counsel argued he was entitled to view

Detective Beezley's binder because the detective opened it upon taking the stand. Counsel argued, "By opening it up, he was, in my view, *obviously potentially* referring to notes. [¶] I believe I have an absolute -- I can find case law that I have a right to notes that a witness is referring to when they are testifying or that they have reviewed to testify." (Italics added.) Counsel added he did not know what the detective had written on the reports in the binder.

The court disagreed with defense counsel's claim that he could look at the entire binder during trial: "I'm just saying I'm not going to stop any trial and let an attorney come up here and go through a whole binder or all the reports just to check and see if they've got everything."

Defense counsel claimed he had not asked to go through the entire binder. He simply wanted to know what the detective was referring to, or what he had open before him in print. The court responded: "The way it's always done is what are you referring to officer[?] I am referring to my report. How many pages is it? Then you can check to see if you've got the pages. [¶] We don't stop and walk up here and go through anyone's binder in front of a jury. It's unduly time consuming and a waste of time. We are not going to do it that way."

The court continued: "You're not going to look through everything he has in his binder to see if you are missing anything, not without some credible evidence that somebody is hiding something from you or you don't have something. Unless

you give me some credible evidence, I'm not going to allow that."

The following morning before the jurors were admitted to the court room, defense counsel picked up the argument and provided the court with case citations he claimed established his right to ask a witness what he is reviewing. The following dialogue occurred:

"MR. KATZ [defense counsel]: I think all of those cases, your Honor, frankly, give me the ample authority for appropriately asking to see what they are reviewing.

"THE COURT: Probably, but I doubt if it's in the middle of a trial.

"MR. KATZ: I can't imagine when else the witness will be referring to something other than when they are testifying at trial.

"THE COURT: 402, before they testify, I don't know of any case, any judge that is going to allow the proceedings to stop while you go through someone's binder.

"MR. KATZ: Yesterday, I was simply pointing out to the Court that had the binder remained closed, it would have been a different story. But when a witness opens up a binder with pages on both sides of it, that is a different situation, in my view.

"THE COURT: I think the proper time to do that, if you want to check something, to make sure you have everything or make sure you are not missing anything, would be to have the district attorney supply you with the binder, or you sit down

with the witness with the binder before trial, something to that effect.

"Even then you would need some prove [sic] that you don't have anything.

"I don't think any defense attorney can come in and say I want to check everything that witness said, if he's going to look at his report or look up anything, I want to see everything that he has in the binder, and the judge stops the trial so you can look through the binder. That's not going to happen in this courthouse.

"MR. KATZ: I represent to the Court I did not find anything on the pages that I saw significant to raise on cross-examination. [¶] But I would point to the Court the fact that there was [sic], in fact, handwritten notes on those papers. In this case, I didn't find anything that I thought was appropriate to raise on cross-examination, but this isn't simply an idle exercise.

"THE COURT: I'm just saying, for your own future use in any trial, I don't know of any judge that's going to stop things and allow you to go through, just because we are talking about officer witnesses or police or sheriff witnesses, they come in with their reports, and very seldom do they remember everything in their report. They take it out and refresh their recollection for a moment. [¶] . . . [¶]

"Just think of that process. You have a homicide case. The [witness] has a big binder. There is no way that [he] will

remember everything in that binder. He wants to refresh his recollection. He looks it up.

"You are saying at this point, I have a right to check everything in that binder to make sure I have everything.

"That would stop every trial in this state until you got finished going through 200 pages of the binder.

"MR. KATZ: Any page that the witness is referring to, I would have a right to look at absolutely.

"THE COURT: I agree with that, a page, yes. But you sit [sic] here and looked through the whole binder. . . . [¶] . . . [¶] I am saying in this courtroom, we are not stopping the trial for you to check binders."

B. *Analysis*

Evidence Code section 771 in general requires a writing used by a witness to refresh his memory while testifying to be produced at the hearing upon the adverse party's request. If the writing is produced at the hearing, the adverse party may inspect the writing, cross-examine the witness about it, and introduce it into evidence if relevant.

The statute reads in pertinent part: "(a) Subject to subdivision (c) [not relevant here], if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

"(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness."

For our purposes in this case, the statute would have been triggered the moment Detective Beezley used a "writing" to refresh his memory regarding any matter about which he testified. Defense counsel was entitled to inspect such a writing and to cross-examine Detective Beezley about it.

Under the terms of the statute, however, defense counsel was not entitled to inspect a document on the claim that the witness was "obviously potentially referring to notes." The right to inspection arises upon the witness's actual use of the document to refresh his memory, not on the potential that he might use a document to refresh his memory.

Moreover, counsel's request was overbroad. The detective's binder is not a writing. Rather, it is a collection of writings. For purposes of the Evidence Code, a writing is any means "of recording upon any tangible thing, any form of communication or representation . . . and any record thereby created, regardless of the manner in which the record has been stored." (Evid. Code, § 250.) Evidence Code Section 771 authorizes inspection of a writing used at trial, but not inspection of all other documents contained in a binder which the witness does not use to refresh his recollection.

Both defense counsel and the trial court correctly stated Evidence Code section 771 gave defense counsel a right to

inspect any page or writing used by the witness to refresh his memory. The statute, however, did not give defense counsel a right to peruse all of the potential writings the witness could have possibly used while testifying. Even though Detective Beezley had opened his binder, defense counsel had no right under Evidence Code section 771 to inspect any writings contained in the binder until Beezley actually used one to refresh his recollection, and then the right would be limited to inspecting just that particular writing.²

Defendant's citations to authority do not compel a different result. (See *People v Smith* (2007) 40 Cal.4th 483, 509; *People v. Boyer* (2006) 38 Cal.4th 412, 461-462; *People v. Estrada* (1960) 54 Cal.2d 713, 716; *International Insurance Co. v. Montrose Chemical Corp.* (1991) 231 Cal.App.3d 1367, 1372-1373.) Each of these cases held that writings relied upon by a witness to refresh recollection for giving testimony must be produced and can be inspected. None of them holds the writings can be inspected before the witness relies upon them.

Defendant further claims the trial court failed to comply with Evidence Code section 352 in denying his request. The court mentioned its concern for "wasting time," but it did not conduct an Evidence Code section 352 hearing. It was not

² The record indicates Detective Beezley referred to documents in his binder at least twice while on direct examination. Defense counsel did not ask to inspect the documents at that time, nor did he limit his later request to inspect to the actual documents the detective reviewed.

required to so. That statute concerns the exclusion of otherwise relevant evidence and does not apply here. The court did not exclude relevant evidence. It exercised its power to control trial proceedings under Penal Code section 1044³ and Evidence Code section 765⁴ upon defense counsel's failure to comply with the procedures and requirements of Evidence Code section 771.

For each of these reasons, we conclude the trial court did not abuse its discretion when it refused defense counsel's request to view Detective Beezley's binder of documents.

II

Penal Code Section 654

Defendant claims the trial court erred by not staying his sentences on five of his six counts of being a felon in possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) He asserts the sentences should have been stayed because all six counts were part of an indivisible transaction. We disagree.

The Legislature has mandated that for purposes of Penal Code section 12021, "each firearm or the frame or receiver of

³ Penal Code section 1044 reads: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

⁴ Evidence Code section 765, subdivision (a), reads: "The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment."

the same shall constitute a distinct and separate offense” under that statute. (Pen. Code, § 12001, subd. (k).) This specific statute controls over the more general Penal Code section 654, and we enforce it here.⁵

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.

⁵ This issue is pending review by the Supreme Court in *People v. Correa* (S163273).